No. 86-1157

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COUNTY OF SUFFOLK,

Petitioner,

—v.—

ARTHUR V. GRASECK, JR.,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

RAMSEY CLARK
36 East 12th Street
New York, NY 10003
(212) 475-3232

MORTON STAVIS
Counsel of Record
WILLIAM M. KUNSTLER
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6464

Attorneys for Respondent

On the Brief:
MAHLON F. PERKINS, JR.

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STATEMENT

This case arises out of the arrest of Paul Oliveri by three Suffolk County police officers for attempted sale of heroin in violation of the New York Penal Law. After being held in custody for six days, Oliveri was released on his own recognizance and the charges against him were dismissed on motion of an assistant district attorney. Oliveri then brought a civil rights action against the arresting officers for arrest without probable cause, use of excessive force and malicious prosecution. The complaint contained related allegations against Suffolk County, its police commissioner and the district attorney. The claims against the police officers were tried to a jury, which found for the defendants. The related claims were either voluntarily withdrawn or dismissed by the judge at the commencement of the trial.

The County moved for costs and attorneys' fees in the amount of $51,112.50 against Oliveri under 42 U.S.C. §1988 and against his attorney, Arthur V. Graseck, Jr. under Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. §1927. The district court, in its decision and order of November 13, 1985 (Pet. App. 1a-16a), found Graseck and Oliveri liable for such costs and fees in the amount requested but determined, after a hearing, that they were not able to pay this amount and awarded $5,000 against Graseck and $500 against Oliveri (Id. at 27a).

Attorney Graseck appealed the award against him. Oliveri did not. In its opinion of October 15, 1986, the Court of Appeals for the Second Circuit reversed the order of the district court against Graseck (Pet. App. 17a-50a).

Decision and Order of the District Court

The district court determined that Graseck and Oliveri were "liable for attorney's fees and costs for instituting meritless claims and for continuing the prosecution of claims after it became apparent that they were without factual or legal basis" (Pet. App. 12a). The court assumed that when Graseck drew the complaint he believed after reasonable inquiry that the action against the three police officers was well grounded in fact and warranted by existing law (Rule 11) and did not multiply the proceedings unreasonably and vexatiously (§1927) (Id. at 15a). It based its determination of liability on its view that materials obtained by Graseck through discovery - a tape recording of a conversation with Oliveri just prior to the arrest and two photographs of Oliveri purportedly taken about an hour after the arrest - should

have convinced Graseck that the officers had probable cause for the arrest and did not use excessive force; he should therefore have discontinued the action (Id. at 12a).

The decision does not discuss the standards for awarding costs and attorneys' fees either under Rule 11 or §1927, or distinguish between them. It does not contain any finding that Graseck engaged in dilatory tactics, harassment, or any other intentional conduct constituting a willful abuse of the judicial process.

ARGUMENT

Petitioner presents two contentions in support of its request for review by this Court: (1) that the court of appeals conducted a de novo review of the evidence and thereby misapplied Rule 52(a) of the Federal Rules of Civil Procedure in conflict with the rulings of this

Court and the standard of review used by the majority of other circuits (Pet. p. 6), and (2) that the court of appeals erred in fashioning a de minimis exception to Rule 11 (Pet. p. 12). Both contentions are meritless. The court of appeals (1) reversed the district court for errors of law and for its failure to articulate and apply long-established standards for imposing sanctions under §1927, not for errors of fact, and (2) did not "fashion" any new exception to Rule 11.

Contention as to Rule 52(a)

The court of appeals held that Rule 11 applies only to the initial signing of a "pleading, motion, or other paper" and does not impose a continuing obligation on the signing attorney (Pet. App. 33a-36a). It agreed with the district judge that Graseck did not violate Rule 11 in bringing the claims against the

three police officers and, since his later failure to withdraw the claims did not implicate Rule 11, considered the propriety of imposing sanctions for such failure only under §1927 (Id. at 39a, 41a).

Citing numerous Second Circuit precedents (none of them cited by the district judge), the court of appeals held that an award under §1927 must be supported by a finding of bad faith similar to that necessary to invoke the court's inherent power, which requires "clear evidence" that the challenged actions are entirely without color and were taken for reasons of harassment or delay or for other improper purposes, and also a "high degree of specificity" in the factual findings of the lower court (Id. at 29a-30a, 32a-33a). The court held that the lower court had spoken in terms too general to meet the high degree

of specifity required to support an award under §1927 (Id. at 37a, 40a). Reviewing the tape recording and the photographs, it found that they did not constitute "clear evidence" that Graseck had continued the claims in bad faith in violation of §1927 Id. at (39a-43a).

Although complaining that the court of appeals "completely ignored" the district court's findings of fact (Pet. p. 6), petitioner does not point to a single finding that the appeals court is supposed to have ignored. Anderson v. City of Bessemer City, N.C., 105 S.Ct. 1504 (1985) (Pet. pp. 8-10), in which this court held that a court of appeals had misapprehended and misapplied the clearly erroneous standard in overturning specific findings of fact by the district court, has no conceivable application to this case, in which it was the very

absence of specific findings that wrought the error.

The asserted conflict with decisions of other circuits, such as Zaldevar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) (Pet. p.7), is imaginary. Zaldevar did not involve the clearly erroneous rule. The court of appeals in that case reversed the district court for applying erroneous standards in imposing Rule 11 sanctions against the plaintiff's counsel for filing a frivolous complaint with the purpose of harassment. 780 F.2d at 832-835. This is in accord with the procedure of the court of appeals in this case. Petitioner even goes so far as to assert that the decision of this panel of the court of appeals is in conflict with the standards for Rule 11 sanctions recently adopted in the Second Circuit in Eastway Construction Corp. v. City of New York, 762 F.2d 243 (1985) (Pet. p.7). If

so, why did it not seek a rehearing on this ground? In any event, Eastway did not involve the clearly erroneous rule any more than Zaldevar: the district court was reversed for an error of law. 762 F.2d at 254. The court of appeals in this case discussed and reaffirmed the standards set forth in Eastway (36a). It would be startled to learn that it has been charged with departing from them.

The contention that this Court should review the decision of the court of appeals because it misapplied the clearly erroneous rule is frivolous.

Contention as to a De Minimis Exception to Rule 11

Among the claims included in the complaint and dismissed by the district judge at the commencement of the trial were claims against the County and its police commissioner under 42 U.S. §§1981 and 1985(3). The court of appeals agreed with the district court that the

inclusion of these "boiler-plate" allegations was improper in the absence of any suggestion of racial or otherwise class-based invidious discrimination but held that any technical violation of Rule 11 was de minimis, as it appeared doubtful that anyone gave these claims serious consideration or devoted any significant work toward disposing of them. The court criticized the defendants for waiting until after jury selection to move to dismiss these claims, considering this delay to be a further reason why sanctions were not warranted. It cautioned the bar that it disapproved of the inclusion of such boiler-plate allegations when the plaintiff clearly does not fall within the protected class (Pet. App. 46a-47a).

It is quite clear that the opinion of the court of appeals does not carve out some new exception to Rule 11

sanctions or announce any general rule in conflict with the decisions of other circuits. This was simply an exercise of the court's discretion, informed by the special circumstances of the case before it and coupled with a warning that similar conduct in the future would be subject to an appropriate sanction.

Nothing in this aspect of the decision warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RAMSEY CLARK
36 E. 12th Street
New York, NY 10003

MORTON STAVIS
Counsel of Record
WILLIAM M. KUNSTLER
Center for Constitutional Rights
666 Broadway
New York, NY 10012
(212) 614-6464

Attorneys for Respondent

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MAHLON F. PERKINS, JR.